(2) 97-7541

APPEAL NO.

IN THE SUPREME COURT OF THE UNITED STATES

AMANDA MITCHELL,
PETITIONER

VS.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit (Court of Appeals No. 96-1605) Eastern District of Pennsylvania No. 94-159-14

PETITION FOR CERTIORARI

STEVEN A. MORLEY, ESQUIRE
BENJAMIN FRANKLIN HOUSE
SUITE 206, 834 CHESTNUT STREET
PHILADELPHIA, PA 19107
(215) 925-4435

22 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASELAW

I. QUESTIONS FOR REVIEW

A. Should this Court hear this case to determine whether the Third Circuit's opinion that a criminal defendant has no Fifth Amendment right to remain silent at sentencing, which is in apparent conflict with this Court's established precedent in Estelle v. Smith, 451 U.S. 454 (1981), was correctly decided?

B. Should this Court hear this case to resolve a conflict among the various circuit courts of appeal on the issue of whether a criminal defendant retains a Fifth Amendment right to remain silent at sentencing?

II. LIST OF PARTIES

The Petitioner, Amanda Mitchell and the United States, are the sole parties to this litigation.

III. OPINIONS IN THE COURT BELOW

The as yet unpublished opinion of the United States Court of Appeals for the Third Circuit, along with the order denying rehearing, is attached as an exhibit to this Petition.

IV. STATEMENT OF JURISDICTION

This case involves a criminal conviction affirmed by the United States Court of Appeals for the Third Circuit on September 9, 1997, and denying reargument on October 17, 1997, making this Petition timely when filed ninety days from the latter date, pursuant to Supreme Court Rule 1. Jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

V. STATUTORY AND CONSTITUTIONAL PROVISIONS

Fifth Amendment to U.S. Constitution:

> "[n]o person...shall be compelled in any criminal case to be a witness against himself."

VI. STATEMENT OF THE CASE

The petitioner, Amanda Mitchell, a forty-five year old mother and grandmother with no prior record was indicted along with twenty-two other individuals as part of a cocaine conspiracy in Allentown, PA from 1989 through March 1994. She was charged in count two with conspiracy to distribute five or more kilograms of cocaine in violation of 21 USC 846, and with three counts of distribution of cocaine within 1,000 feet of a school in violation of 21 USC 860(a) (counts 11, 21 and 28.).

On October 16, 1995, the appellant entered an open plea of guilty to all four counts in the indictment with which she was charged, but specifically reserved the question of her level of culpability for the quantity of cocaine distributed as an issue to be determined at sentencing. She was advised that her guilty plea to the counts charging her with distribution near a school carried a mandatory minimum of one year in prison. She was also advised that if the court found that she had distributed in excess of five kilograms of cocaine, she would be subject to a ten year mandatory minimum sentence.

At the sentencing hearing before Judge Cahn on July 2, 1996, the court heard testimony from three trial witnesses and incorporated their trial testimony, as well as that of a fourth witness. Based on this evidence, Judge Cahn determined that Ms. Mitchell was a regular distributor for the conspiracy from early

1992 through the early 1994. According to his calculation, she distributed in excess of thirteen kilograms yielding a sentencing guideline range between ninety-six and a hundred and twenty-one months incarceration. Due to the mandatory minimum for distributing in excess of five kilograms, the court imposed a sentence of one hundred and twenty months, or ten years in prison.

Four witnesses addressed the alleged involvement of Amanda Mitchell - Alvitta Mack, who did not testify at sentencing, but whose trial testimony was adopted - and Paul Belfield, Shannon Riley and Richard Thompson, who testified at sentencing and adopted trial testimony.

The only witness who gave precise measure of drug quantities was Alvitta Mack. From March 1992, until July 1993 she taped deliveries of cocaine to her as well as the activities of various co-defendants in the conspiracy under supervision of DEA. At trial she testified as to three deliveries involving Amanda Mitchell - April 9, 1992, August 12, 1992, November 11, 1992. These corresponded to the three substantive counts to which petitioner pled guilty and amounted to approximately two ounces of cocaine.

Paul Belfield testified at trial and sentencing that in late 1991 or early 1992, Amanda Mitchell would deliver .2 or.4 grams of cocaine to him at his home. His testimony placed Amanda

Mitchell's involvement in 1992, which was not disputed.

Shannon Riley testified at the sentencing hearing that she adopted her trial testimony in this case. Ms. Riley admitted in sentencing testimony that she never mentioned Amanda Mitchell as a worker for the leaders of the conspiracy during her proffers with the government. She mentioned Ms. Mitchell in her trial testimony, but in her sentencing hearing testimony stated that she did not know whether Amanda Mitchell was selling drugs or buying drugs on the occasions she saw her at the bar which was the locus of some of the drug operations.

The only witness who offered more specific testimony regarding drug quantities was Richard Thompson. At sentencing he stated that from April 1992 through May 1992, he worked with Amanda Mitchell and observed her two to three times per week receiving bags for distribution of 1.5 to two ounces per occasion. This meant she had responsibility for distributing three to six ounces of cocaine for the weeks that she worked. He further testified that she only worked for him one day between June and August of 1992, but between August 1992 and December 1993, she was a regular courier of cocaine. Finally, he testified for the first couple of months of 1994, she was a manager along with Kathy Hottenstein, who was acquitted by the jury at trial.

On cross-examination, Thompson admitted that between August

and December of 1992 he only heard from others that Amanda Mitchell was involved. In addition, Thompson's trial testimony contradicted his sentencing testimony. At trial, he stated that Ms. Mitchell made deliveries for him from June through August, 1992. At sentencing his testimony was that she worked for him on only one day during that time. Further, he never mentioned Ms. Mitchell's involvement after 1992 in his trial testimony or in any of his proffers to the government. At trial he stated, "Lori, Lulu and myself," made deliveries for Kathy Hottenstein in 1993. He did not mention Amanda Mitchell as one of the individuals making deliveries in 1993. In contrast, at sentencing, he testified that she was a regular courier throughout 1993 and a manager in early 1994.

Judge Cahn credited the longer period of time for Ms. Mitchell's involvement as set forth in Thompson's testimony (distributions in 1992, 1993 and 1994) and used that as a basis to calculate personal responsibility of Ms. Mitchell at "something over" thirteen kilograms, 3.3 kilograms in 1994, 5.6 kilograms in 1993 and 3.9 kilograms in 1992. Judge Cahn never explained why he was adopting the higher estimate from Thompson's testimony.

Judge Cahn inquired of Ms. Mitchell what her involvement in the drug distribution network was. She stated:

> My name is Amanda Mitchell. I know for a lon[illegible] time I used drugs. I did a lot of things I - to get drugs. I am thankful to be alive today, from getting away from drugs. I changed my whole life totally around, and I just got away from it. I got too involved with doing drugs, and as much drugs as I did, I couldn't have did all the other things. That's all I have to say.

Judge Cahn drew a negative inference from Ms. Mitchell's decision to invoke her Fifth Amendment right to remain silent. He stated that if he was incorrect in drawing such a negative inference against her right to invoke the Fifth Amendment, the Court of Appeals would remand the case for resentencing and he would take another look at the credibility of the witnesses who testified against her.

The Third Circuit affirmed the judgment of sentence in a written, published opinion on September 9, 1997. In its opinion, the Third Circuit held that Ms. Mitchell did not have a Fifth Amendment right to refuse to testify at her sentencing proceeding. On October 17, 1997, the Third Circuit denied the petition for rehearing and rehearing en banc, by a vote of eight to four.

VII. REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE THIRD CIRCUIT IGNORES SETTLED LAW OF THE UNITED STATES SUPREME COURT TO THE EFFECT THAT THE FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE ONESELF APPLIES AT SENTENCING PROCEEDINGS.

1. Sentencing is Part of a "Criminal Case" and as Such All Constitutional Protections of a "Criminal Case" Apply With Full Force

The Fifth Amendment commands "[n]o person...shall be compelled in any criminal case to be a witness against himself."

The opinion of the Third Circuit wrongly decides a constitutional question of enormous institutional and jurisprudencial importance. Approximately ninety percent of criminal defendants plead guilty. Therefore, sentencing, is frequently of greater importance than the question of guilt or innocence.

There can be no question that sentencing is part of the "criminal case", as defined by the Fifth Amendment and therefore all constitutional guarantees attach. It is pellucid that "it is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings." Von Moltke v. Gillies, 332 U.S. 708, 722 (1948)(Black, J., plurality opinion) (emphasis added). The Third Circuit applied these precepts and found the Sixth Amendment right to counsel applies at sentencing. United States v. Salemo, 61 F.3d 214 (3d

Cir. 1995). In determining the application of the Ex Poste Facto clause to criminal proceedings, it is the long-standing jurisprudencial history of this Court that an increase in punishment violates the proscriptions of that clause in "penal" cases. Weaver v. Graham, 450 U.S. 24 (1981). Similarly, the Fifth Amendment right to be free from double jeopardy applies not only to being tried twice for the same offense, but also to being subjected to an increase in punishment. North Carolina v. Pearce, 395 U.S. 711 (1969).

The conclusion that the Third Circuit reached - that the Fifth Amendment right to protect self-incrimination does not apply at sentencing - flies in the face of the plain language of the Fifth Amendment and the reasoning of this Court. This constitutional provision prohibits testimonial compulsion "in any criminal case." The import of the Third Circuit decision in this case is to remove the sentencing proceeding from being part of a "criminal case". Since this Court as well as the courts of appeals have consistently applied constitutional protections of criminal cases at sentencing proceedings, the decision of the Third ircuit flatly contradicts established precedent.[1]

---

[1] The Fifth Amendment privilege has generally been held to be available "until appeal is exhausted or until the time for appeal expires." 1 McCormick on Evidence §121, at 440 (4th Ed. J.W. Strong 1992). A judgment of conviction becomes final for Fifth Amendment purposes on the date direct appellate review is completed, including the time to seek certiorari to this Court.

That sentencing, and its concomitant right to remain silent pursuant to the Fifth Amendment, is part of a "criminal case" has been recognized by this Court in Estelle v. Smith, 451 U.S. 454 (1981). In that case, this Court considered statements made by an incarcerated defendant to a psychiatrist to be used at a penalty hearing following a conviction for first degree murder. In concluding that such statements were inadmissible under the Fifth Amendment in the absence of warnings mandated by Miranda v. Arizona, 384 U.S. 436 (1966), the court cautioned that the core of the Fifth Amendment right to protect against self-incrimination is:

> 'The availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites'... we can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned... Any effort by the State to compel respondent to testify against his will at the sentencing clearly would contravene the Fifth Amendment. (emphasis added)

451 U.S. at 462-63 (citations omitted). Indeed, at the oral argument in Estelle, the State conceded it could not compel the defendant's testimony at sentencing. Id., n.7. The core of the Fifth Amendment right to protect against self-incrimination involves the issue of burden of proof:

Caspari v. Bohlen, 510 U.S. 383, 114 S.Ct. 948, 953-4 (1994).

> ...The requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips. Culombe v. Connecticut, 367 U.S. 568, 581-2, 81 S.Ct. 1860, 1867, 6 L.Ed. 2d 1037 (1961) (emphasis added).

Id. at 461.

The Estelle Court did not hesitate to find that the Fifth Amendment was fully protective at sentencing. This Court continued the vitality of that decision in Pennsylvania v. Muniz, 496 U.S. 582 (1990), Powell v. Texas, 492 U.S. 680 (1989) and Satterwhite v. Texas, 486 U.S. 249 (1988). While each of these cases, including Estelle, involved the death penalty, this is no basis to limit the applicability of the Fifth Amendment protections. Certainly the gravity and importance of a death penalty case is reason to proceed with the utmost legal caution. However, that is not a reason to find that the constitutional right would apply only where the death penalty is at issue. To so hold would fly in the face of established legal principles.

Indeed, in Estelle, this Court made abundantly clear that the,

> ...availability of the Fifth Amendment privilege does not turn upon the type of proceeding in which its protections is invoked, but upon the nature of the statement or admission and the exposure which it invites. In re Gault, 387 U.S. 1 (1967).

Id. at 463.

This Court's reliance upon Gault is significant. That case

upheld the invocation or constitutional rights of juveniles at adjudication proceedings. Gault and its application to adult cases establish without question that constitutional protections apply in the broad span of the criminal process - from the relative lenient treatment of juveniles to the ultimate implementation of the law's harshest penalty - death.

Therefore, to apply the Fifth Amendment at the guilt stage of proceedings and not at the sentencing, contravenes the fundamental application of this sacred constitutional provision and its established interpretation by this Court. The Third Circuit opinion flatly contradicts such precedent.

2. The Denial of the Right to Invoke the Fifth Amendment at Sentencing Implicates the Petitioner's Right to be Free From Increased Punishment as Well as the Possibility of Future Prosecutions

In Hoffman v. United States, 341 U.S. 479, (1951), the Supreme Court ruled that a court may not require a witness to answer after claiming a Fifth Amendment privilege unless it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such a tendency to incriminate." 341 U.S. at 488. This Court held that the self-incrimination privilege "must be accorded liberal construction in favor of the right it was intended to serve." Id. at 486. An adverse inference applied against the petitioner constitutes

compulsion to "be a witness against" herself. Griffin v. California, 380 U.S. 609 (1965).

The Third Circuit's decision in this case can produce a procedural nightmare at sentencing hearings. Under this decision, there is nothing to prevent a prosecutor from calling a defendant as a witness at his or her own sentencing. If the defendant fails to respond to questions, the defendant would then be subject to contempt. Sentencing would devolve into mini-trials over the proper application of the Fifth Amendment and the scope of the punishment to be meted out for the failure to testify.

The Fifth Amendment application at sentencing should protect against the possibility of an increase in sentence. It is clear that testimony at such a proceeding could lead to increased punishment, based upon the drug quantities distributed, increasing a defendant's role in the offense, or even being subject to an enhancement for obstruction of justice by refusing to testify when one does not have a legal right to do so. USSG §1B1.3; See, United States v. Watts, 529 U.S. -, 136 L.Ed.2d 554 (1997). Therefore, like the defendant in Estelle, who wished to avoid a harsher penalty (death), the defendant at a sentencing hearing has a palpable interest to protect by invoking the Fifth Amendment right to refuse to testify.

Assuming arguendo that the Fifth Amendment is not part of a

"criminal case", and therefore does not protect against statements made at the defendant's own sentencing, there is no question that the Fifth Amendment does protect against potential prosecution for other offenses. When a Fifth Amendment privilege is claimed, the court must consider, "the implications of the question, in the setting which is asked..." Malloy v. Hogan, 378 U.S. 1, 14 (1964). Only if no risk of incrimination is evident may the witness be called upon to put forward some reasonable basis for the fear of self-incrimination as a result of truthful, testimonial disclosures. The ultimate burden of persuasion with respect to the validity of the claim of the Fifth Amendment privilege rests with the party opposing the claim.

In spite of there being no obligation for the petitioner to set forth a basis for the invocation of the Fifth Amendment, its application is clear. She was convicted of conspiracy and three "schoolyard counts." 21 USC §846, 860. The questions to which she remained silent concern "relevant conduct" under USSG §1B1.3. To qualify as "relevant" an additional transaction had to consist of criminal conduct. Therefore, as of July 2, 1996, she risked the prosecution under 21 USC §841(a) for any drug transaction which occurred within the previous five years other than the three for which she had already been convicted. She would be subject to prosecution for such other substantive transaction under federal or state law, or both. Her conviction for

conspiracy would not prohibit such prosecutions since there is no double jeopardy bar to successive prosecutions for conspiracy and substantive crimes. United States v. Felix, -U.S.-, 112 S.Ct. 1377 (1992) and United States v. Dixon, -U.S.-, 113 S.Ct. 2849 (1993).

Any answer she gave about "relevant conduct" could also afford a "link in a chain" of evidence to convict, potentially, of RICO 18 U.S.C. §1962(c), continuing criminal enterprise - CCE - (21 U.S.C. §848), money laundering (18 U.S.C. §§1956-57), Travel Act violations (18 U.S.C. §1952), telephone counts (21 U.S.C. §843), tax evasion (26 U.S.C. §7201) and potentially other violations of the criminal law.

The possibility of incrimination on other charges satisfies the standard that a Fifth Amendment risk must be "real and appreciable". Marchetti v. United States, 390 U.S. 39, 48 (1968). The fact that there are no pending charges or investigations, or that a prosecutor has assured the defendant that he will not be charged is not sufficient to overcome a claim of privilege. Hoffman v. United States, 341 U.S. at 486.

The Third Circuit's decision in this matter runs afoul of this Court's pronouncements on the Fifth Amendment. It improperly permits the defendant to be the instrument of her own sentencing increase as well as subjects her to the potentiality of new prosecutions. It raises the specter of creating enormous

complications at sentencing on this collateral issue. For these reasons, this Court should hear this case and rectify the Third Circuit's decision which runs flatly and clearly counter to established precedent of this Court.

B. THE THIRD CIRCUIT DECISION HAS CREATED A SPLIT IN THE CIRCUITS IN THAT VIRTUALLY ALL OTHER CIRCUITS WHICH HAVE CONSIDERED THE APPLICATION OF THE FIFTH AMENDMENT AT SENTENCING HAVE FOUND THE INVOCATION OF THAT CONSTITUTIONAL PRIVILEGE PROPER

In reaching the conclusion that the Fifth Amendment does not apply to sentencing proceedings, the Third Circuit opinion examined the law from other jurisdictions and concluded that most of those cases, which appear to hold that the Fifth Amendment can be invoked as a protection for the defendant from being the instrument of his own sentence increase, really do so only because of the threat of further prosecution. The Third Circuit then concluded that since there was no prospect of further prosecution in this case - and since it held that risk of increased punishment is not a basis to invoke the Fifth Amendment - the opinions from other circuits were inapposite.[2]

In reality, the other jurisdictions which have considered this question clearly state that there are two separate grounds for the invocation of the Fifth Amendment at sentencing - (1) to protect against an increase of sentence, and (2) to protect against future prosecution. In United States v. Lugg, 892 F.2d 101, 103 (D.C. Cir. 1989) that Court clearly stated:

> The convicted but unsentenced defendant retains a legitimate protectable Fifth Amendment interest in not testifying as to incriminating matters that

---

[2] Of course, as noted supra. petitioner is at risk for prosecution for substantive offenses.

could yet have an impact on his sentence. (emphasis added).

The First Circuit cited Lugg in United States v. Delacruz, 996 F.2d 1307, 1312-13 (1st Cir. 1993) with approval. The court noted that if the defendant in that case testified it could impair his prospects of being deemed a "minor participant" under the sentencing guidelines or might even establish him as a supervisor, yielding an increased sentence. Therefore, the First Circuit recognized, and held, that the invocation of the Fifth Amendment was proper because compelled testimony might increase the defendant's sentence. Similarly, United States v. Matthews, 997 F.2d 848, 851, n.4 (11th Cir. 1993) recognized that other circuits applied the Fifth Amendment at sentencing so as to protect the defendant from being the instrument of his own sentence enhancement.

In United States v. Bahadar, 954 F.2d 821, 824 (2d Cir. 1992), that Court stated:

> Since Ali had not been sentenced on the count to which he pled guilty (and was faced with two open counts, later dismissed by the government, any testimony which he gave at Bahadar's trial could have been used as the basis for an upward departure at sentencing (emphasis added).

In accord, Bank One of Cleveland v. Abbe, 916 F.2d 1067, 1075-76 (6th Cir. 1990), which agreed with other circuits that the Fifth Amendment right against self-incrimination continues in force at sentencing and United States v. Garcia, 78 F.3d 1457, 1463 (10th

Cir. 1996), which follows Lugg, supra.

These cases stand for the proposition that the right to be free from increased punishment is a valid invocation of the Fifth Amendment at sentencing. The fact that there are or may have been pending charges, or the prospect of future charges was a separate and independent reason to permit the invocation of the Fifth Amendment. In contrast, the Third Circuit takes a contrary view. In the instant case, that court held that there is no Fifth Amendment right to refuse to testify at sentencing for fear that such testimony could lead to a higher sentence. This is in stark contrast to virtually every other circuit which has considered this issue.

Therefore, this Court should hear this case and resolve this conflict in the circuits.